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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

2006 JUN 27 A 9:29

AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE STAFF'S REQUEST
FOR APPROVAL OF COMMERCIAL LINE
SHARING AGREEMENT BETWEEN QWEST
CORPORATION AND COVAD
COMMUNICATIONS COMPANY.

DOCKET NO. T-03632A-04-0603
DOCKET NO. T-01051B-04-0603

PROCEDURAL ORDER

BY THE COMMISSION:

On May 14, 2004, Qwest Corporation ("Qwest") submitted two agreements to the Arizona Corporation Commission ("Commission"). The first document was entitled "Commercial Line-Sharing Amendment to the Interconnection Agreement" signed April 14, 2004. This Agreement sets forth the terms and conditions governing Qwest's provision of line-sharing to Covad for orders placed through October 1, 2004, pursuant to the transitional rules created by the FCC's *Triennial Review Order*.¹ Qwest filed this Agreement with the Commission for approval under Section 252 of the Telecommunications Act of 1996 ("1996 Act").

On the same date, Qwest submitted a second agreement with Covad entitled "Terms and Conditions for Commercial Line Sharing Arrangements" ("Arrangements Agreement") also executed April 14, 2004. Qwest states it provided this agreement with the Commission for informational purposes only. Qwest claims that the Arrangements Agreement is a "commercially negotiated" agreement and argues that it is not required to file it with the Commission for approval under Section 252 of the 1996 Act. Under the Arrangements Agreement, Qwest agreed to provide access to the high frequency portion of its local loops so that Covad may offer advanced data services simultaneously with Qwest's voice band service. The Arrangements Agreement pertains to line sharing orders placed after October 1, 2004.

¹ Report and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advance Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147 (rel. August 21, 2003).

1 On August 26, 2004, the Commission's Utility Staff ("Staff") filed the Arrangements
2 Agreement with Docket Control and requested that a Docket be opened to review the matter as is
3 normally done when interconnection agreements are submitted to the Commission for approval.

4 On September 13, 2004, Qwest filed a Motion to Dismiss Staff's Request for Review of
5 Negotiated Commercial Agreement (With Alternative Request for Intervention). Qwest argues that
6 as a result of the D.C. Circuit's decision in *United States Telecom Association v. FCC* ("USTA II"),²
7 Qwest does not have to provide line sharing as a network element under Section 251 or 252 of the
8 1996 Act for line sharing orders placed after October 1, 2004. Qwest argues that the Arrangements
9 Agreement does not create any terms or conditions for services that Qwest must provide under
10 Sections 251(b) and (c), and it is not an interconnection agreement or an amendment to the existing
11 interconnection agreement between Qwest and Covad.

12 On September 21, 2004, Staff filed a Notice that it was seeking comments from interested
13 parties on Qwest's and Covad's filing obligations under Section 252 of the 1996 Act with respect to
14 the Arrangements Agreement.

15 On October 7, 2004, Covad filed Comments pursuant to Staff's September 21, 2004 Request.
16 Covad stated that it believes that all filing obligations rest with Qwest. Covad acknowledges that
17 Qwest takes the position that the Arrangements Agreement does not have to be filed for approval
18 because it does not involve unbundled network elements under Section 251 as a result of the FCC's
19 *Triennial Review Order*. Covad notes that both Qwest and Covad have publicly disclosed the terms
20 of the Arrangement Agreement and that Qwest has offered these terms to other carriers. Covad states
21 it concurs with this approach. In addition, Covad urges the Commission to stay this Docket until
22 final rules are issued by the FCC. Covad further notes that the FCC issued a Notice of Proposed
23 Rulemaking on the filing standard for these types of commercial agreements in its Order and Notice
24 of Proposed Rulemaking released on August 20, 2004, *In the Matter of Unbundled Access to Network*
25 *Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*
26 *Carriers*, WC Docket No. 04-313, CC Docket No., 01-338, para. 13.

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28 ² *United States Telephone Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

1 On October 5, 2004, Staff filed an Opposition to Qwest's Motion to Dismiss. Staff states that
 2 Section 252(e) of the 1996 Act requires that "any" Interconnection Agreement be filed with the state
 3 commissions. Staff argues that there was no Congressional intent to qualify the Section 252(e) filing
 4 requirement to mean only those agreements which contain ongoing obligations under Section 251 (b)
 5 and (c) as suggested by Qwest. Staff also argues that the Commission has the authority to approve
 6 interconnection agreements containing terms and conditions relating to network elements provided
 7 under section 271. In addition, Staff claims that there is no exception to the Section 252(e) filing
 8 requirement for "commercially negotiated" agreements.

9 On October 8, 2004, Staff filed the Order of the United States District Court for the Western
 10 District of Texas in *Sage Telecom, LP vs. Public Utility Commission of Texas*,³ as Supplemental
 11 Authority.

12 On October 15, 2004, Qwest filed its Reply in Support of its Motion to Dismiss. Qwest
 13 argues that Staff's interpretation of the filing requirements of Section 252(e) is misplaced as it is
 14 directly contradicted by section 252(e)(2) that specifically establishes that the interconnection
 15 agreements are those that are negotiated under section 252(a). According to Qwest, Section 252(a)
 16 refers specifically to negotiations conducted pursuant to "a request for interconnection services, or
 17 network elements *pursuant to section 251*." (Emphasis added). Furthermore, Qwest argues, this
 18 interpretation is consistent with the FCC's *Declaratory Order*,⁴ in which the FCC concluded that
 19 carriers are only required to file for approval with state commissions those agreements containing
 20 ongoing obligations relating to Section 251(b) or (c). Qwest also argues that Staff does not address
 21 the absence of any delegation to state commissions of approval or decision-making authority over
 22 non-251 network elements. Qwest distinguishes its agreement with Covad from the agreement that
 23 was the subject of the decision in *Sage Telecom*, on the grounds that the latter contained terms and
 24 conditions that indisputably related to ongoing obligations under sections 251 (b) and (c) in addition
 25 to non-251 terms. In this case, Qwest argues, the Covad Arrangements Agreement does not contain

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 27 ³ Case No. A-04-CA-364-SS (rel. October 7, 2004).

28 ⁴ *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, *Memorandum Opinion and Order* (October 4, 2002).

1 any terms relating to Section 251.

2 By Procedural Orders dated November 18, 2004, and January 3, 2005, the matter was set for
3 oral argument on January 28, 2005.

4 On January 14, 2005, Qwest filed as supplemental authority a copy of a Final Order of the
5 New Mexico Public Regulation Commission, dated December 23, 2004, *In the Matter of an*
6 *Agreement Between Qwest Corporation and Covad Entitled "Terms and Conditions for Commercial*
7 *Line Sharing Arrangements,"* case number 04-00209-UT.

8 On January 20, 2005, Staff filed as supplemental authority the Final Order and Order on
9 Reconsideration of the Montana Public Service Commission, in the *Matter of Commercial Line*
10 *Sharing Agreement for DSL Services Provisioned After October 1, 2004, Between Qwest and DIECA*
11 *Communications, Inc. d/b/a Covad Communications Company,* Docket No. D2004.6.89.

12 On June 14, 2005, Qwest filed as supplemental authority the Order entered by the United
13 States District Court for the District of Montana in *Qwest Corporation v. Montana Public Service*
14 *Commission,* CV-04-053-H-CSO, on June 9, 2005.

15 Substantial time has elapsed since the parties argued their respective positions in this matter.
16 In the interest of a complete record, the parties should have an opportunity to update the record to
17 reflect subsequent relevant legal opinions or orders and to make procedural recommendations.

18 IT IS THEREFORE ORDERED that interested parties, including Staff, shall file any
19 supplemental authorities and legal analysis as well as any procedural recommendations by July 28,
20 2006.

21 IT IS FURTHER ORDERED that parties shall file any Responses by August 18, 2006.

22 IT IS FURTHER ORDER that the presiding Administrative Law Judge may rescind, alter,
23 amend, or waive any portion of this Procedural Order by subsequent Procedural Order or by ruling at
24 hearing.

25 DATED this 23rd day of June, 2006.

26
27 
28 JANE L. RODDA
ADMINISTRATIVE LAW JUDGE

Copy of the foregoing mailed/delivered
this 29th day of June, 2006, to:

TIMOTHY BERG
TERESA DWYER
FENNEMORE CRAIG, P.C.
3003 NORTH CENTRAL AVE., SUITE 2600
PHOENIX, ARIZONA 85012-2913
ATTORNEYS FOR QWEST CORPORATION

NORMAN G. CURTRIGHT
CORPORATE COUNSEL
QWEST CORPORATION
20 E. THOMANS ROAD, 16TH FLOOR
PHOENIX, ARIZONA 85012

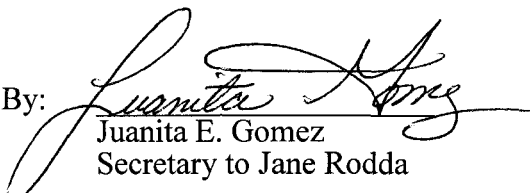
MICHAEL W. PATTEN
ROSHKA DEWULF & PATTEN PLC
400 EAST VAN BUREN STREET, SUITE 800
PHOENIX, ARIZONA 85004

KAREN FRAME
SENIOR COUNSEL
COVAD COMMUNICATIONS COMPANY
7901 LOWRY BOULEVARD
DENVER, CO 80230

ERNEST G. JOHNSON, DIRECTOR
UTILITIES DIVISION
ARIZONA CORPORATION COMMISSION
1200 WEST WASHINGTON STREET
PHOENIX, AZ 85007

CHRISTOPHER KEMPLEY, CHIEF COUNSEL
ARIZONA CORPORATION COMMISSION
LEGAL DIVISION
1200 WEST WASHINGTON
PHOENIX, AZ 85007

By:


Juanita E. Gomez
Secretary to Jane Rodda